14124

No. 107.

Supreme Court of the United States.

OCTOBER TERM, 1902.

PAUL O. WEBER, PLAINTIFF IN ERROR,

vs.

CHARLES ROGAN, COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

Paul O. Weber, plaintiff in error here, filed an original suit in the Supreme Court of the State of Texas, asking that said court in the exercise of its original jurisdiction, issue a writ of mandamus to Charles Rogan, the Commissioner of the General Land Office of Texas, directing said officer to award to plaintiff in error two isolated and detached sections of the

public school land, situated respectively in Polk and Jefferson Counties, in the State of Texas.

In his petition, plaintiff in error alleged:

That on the 11th day of August, 1899, he being desirous to purchase some public lands belonging to the Public School Fund of the State of Texas, and which said State, through its laws, had then offered for sale, applied to the Commissioner of the General Land Office of Texas, for the purchase of said lands at and for the price fixed by law for the same. That he fully complied with the terms of sale, offered by the law, authorizing him to purchase said lands from the State of Texas.

The lands are fully described, being a section of six hundred and Forty (640) Acres of land situated in Polk County, Texas, and a one-half (1-2) section of Three Hundred and twenty (320) acres in Jefferson County, Texas. It was further averred that the two (2) sections of land, at the time plaintiff in error made his application to purchase the same, belonged to the Public School Fund of the State of Texas, were detached and isolated from other public lands and were situated in counties organized prior to the first day of January, 1875, and not in the counties of El Paso, Presidio and Pecos. That in applying for the purchase of the aforesaid lands, he used the forms of application prepared for that purpose, by the Commissioner of the General Land Office together with the Attorney General of the State of Texas, as required by law, and filed his said application with the said Commissioner of the General Land Office, on the 11th day of August 1899, and appended to said application the affidavit required by law, and paid to the Treasurer of said State of Texas, the sum required by law to be paid to the State in the purchase of such character of lands; that he also filed with the said Commissioner of the General Land Office

his obligation payable to the State of Texas, for the balance of the purchase price required by law to be paid in 39 annual installments to the State with interest at the rate of Three per cent (3%) per annum. That all of said acts were done and performed in full and strict compliance with the law, providing for the sale of all isolated and detached sections and fractions of sections of land situated in counties organized prior to the first day of January 1875, other than the Counties of El Paso, Presidio and Pecos.

But that said Commissioner of the General Land Office rejected said applications for said land, and refused to award the same to plaintiff, in error, alleging as a pretended reason for his said refusal that the said two (2) sections of land had theretofore been classified, the first as timber land and the second as grazing land, and that the law was not applicable to grazing and timber land, but that sections and fractions of sections that are either classed as grazing or timber land could not be purchased under the law in force at the date of the application, made by plaintiff in error for one dollar ($1.00) per acre, although such grazing and timber lands were isolated and detached from other public lands and were situated in counties organized prior to the first day of January, 1875, and that the plaintiff in error having offered for said two (2) sections of land the price of one dollar ($1.00) per acre only, the said Commissioner of the General Land Office was without legal authority to award the said two (2) sections of land to the said plaintiff in error.

Plaintiff in error further averred it to be true that said two (2) sections of land, before and prior to the time that the same became isolated and detached, were classified by the Commissioner of the General Land Office, the one as timber land and the other as grazing, but that such classification from and after the time that the lands became isolated and

detached was no longer of any force or effect, because the provisions of the law in Texas requiring lands belonging to the Public School Fund to be classified, do not relate, or apply to isolated and detached sections or fractions of sections of such lands situated in counties organized prior to the first day of January, 1875; but that the price of such lands was fixed by law at One Dollar ($1.00) per acre, irrespective of any classification made of said lands, either before or after the time they became isolated and detached and that such classification was wholely useless and of no force and effect, and that by virtue of the acceptance by plaintiff in error of the terms of sale offered by the law itself, and by virtue of the filing of his application, affidavit and obligation with the Commissioner of the General Land Office, under the terms prescribed by the law and depositing with the Treasurer of the State of Texas, at the same time the several sums of money due the State of Texas for said lands, he became, in law, the purchaser of said two (2) sections of land, irrespective of said classification, and the Commissioner of the General Land Office was without legal authority to withhold from plaintiff in error, the award of said lands and that the rejection of his applications therefor by the said Commissioner was in violation of the law and clouded the title of plaintiff in error to said lands.

This petition was filed in the Supreme Court of the State of Texas on the 13th day of November, 1899, by order of court. (Rec., pp. 1, 2, 3.)

Charles Rogan, Commissioner of the General Land Office, defendant in error here ,filed his answer to this suit on January 8th, 1900. The answer contains some special demurrers, which however were disregarded by the Court, and are not material to this inquiry. In his answer he admitted plaintiff in error's applications for these lands, as averred in

the petition, and attached the same to his answer. He also admitted that the lands were isolated and detached and belonged to the Public School Fund of the State of Texas, and were situated in counties organized prior to the first day of January, 1875. That he refused to sell the section of land situated in Polk County, because the same was applied for at the price of One Dollar ($1.00) per acre, one-fortieth (1-40) cash, and the remainder payable in accordance with the requirements of the law, to be evidenced by written obligation, that said land is pine timbered land, and is of the actual value of not less than eight ($8.00) per acre, and that under the Act of 1897 it was classified as pine timbered land and valued at eight ($8.00) dollars per acre. That such classification and valuation were in strict conformity with the law, and were in full force and effect before and at the time the filing of the application by the plaintiff in error to purchase the same. That while said land was detached, it being in fact timbered land, he had no power to sell the same under article 4218y of the above Act of 1897. This being his construction of the law, he refused to award said land to the plaintiff in error on his said application; and he further alleged that if he was wrong in his construction of the law, then, nevertheless, no writ of mandamus should be issued against him, because the law gave him a discretion as to whether he would sell said land or not, which discretion could not be reviewed by the Court. He also alleged it would be inequitable and unjust to the State of Texas to compel the Commissioner of the General Land Office to award said land to the plaintiff in error, at the price of one dollar ($1.00) per acre, when the fair, reasonable market value of the same is not less than eight dollars ($8.00) per acre.

He further answered that he refused to sell the half (1-2) section of land situated in Jefferson County, upon the ap-

plication of plaintiff in error, because the same was grazing land and of the actual value of two dollars ($2.00) per acre, and said land was classified according to law as grazing land, and valued at two dollars ($2.00) per acre, and the classification on same was in strict conformity with the law and was in force and effect before and at the time of the filing of the application to purchase the same.

That while said land was detached, it being, as a matter of fact, grazing land and not agricultural land, he had no power to sell it under article 4218y of the Act of 1897. This being his construction of the law, he refused to award said land to plaintiff in error, on his said application. That if however the above construction of the law is wrong, the he averred that no writ of mandamus should be granted against him, for the said half (1-2) section of land, because the law gave him a discretion, as to whether he would sell said land or not, which discretion the Court had no right to to review. He further averred that it would be inequitable and unjust to the State of Texas to compel its Commissioner of the General Land Office, to award said land to plaintiff in error, at the price of One Dollar ($1.00) per acre, when the fair reasonable market value of same is not less than Two Dollars ($2.00) per acre. Respondent further averred that the said one-half (1-2) section of land had been lawfully classified and valued, under the Act of 1897 as watered grazing land, and valued at two dollars and half ($2.50) per acre. And on May 11th, 1897, said land, in accordance with said classification and valuation, was lawfully sold to one McHenry Winburn; that said sale was in all things valid and vested the title to said land in the said Winburn. That on July 20th, 1899, Winburn having failed to pay the annual interest to the State, his purchase of said land was forfeited. The respondent did not place said lands on the market for sale until the first day of September,

1899, on which day he placed the said land upon the market for sale as grazing land, and valued it at two dollars ($2.00) per acre. That on said day, in accordance with section six (6) of the Act of 1895, he notified in writing the County Clerk of Jefferson County, Texas, that said one-half (1-2) section of land was on the market for sale as grazing land, at the value of two dollars ($2.00) per acre. That until said notification was so sent to the County Clerk, the said land was not on the market for sale, and that when plaintiff in error made application to buy said land on August 11th, 1899, it was not on the market for sale, and by reason thereof, plaintiff in error had no right to buy it and acquired no rights thereto by his application to purchase the same. It was further contended in the answer that the attempted purchase of the lands, in the manner set forth in the petition of plaintiff in error, was illegal and void, because the applications to purchase said lands were not accompanied by affidavits to the effect that the applicant desired to purchase the lands for a home, and that he had in good faith settled thereon, as is required by section nine (9) of the Act of 1895. That under said law said lands can only be sold to settlers and that plaintiff in error, had not settled on either of said tracts of land, but was an actual resident of the City and County of Galveston, Texas.

That by reason of all of the matters stated in the answer; the attempted purchase of the land was absolutely null and void. (Rec., pp. 4 to 7.)

The application, affidavit and obligation are upon forms prepared for the purchase of detached lands, by the Commissioner of the General Land Office and the Attorney General of the State of Texas, and are fully set forth, on Pages 7 to 12 in the Transcript of the Record.

Upon these pleadings the conceded facts briefly stated and as found by the trial of court are substantially as follows:

On the 11th, day of August 1899, Paul O. Weber, plaintiff in error, upon forms furnished for that purpose, by the Commissoner of the General Land Office of the State of Texas, filed two (2) applications with that officer for the purchase, at the price of one dollar ($1.00) per acre of one whole section of land, and one-half (1-2) section of land belonging to the Public School Fund of the State of Texas, and situated in Counties organized prior to the first day of January 1875, and not in the counties of El Paso, Presidio or Pecos. He appended to his applications the affidavits required by law, paid one-fortieth (1-40) of the purchase price to the Treasurer of the State of Texas, and for the payment of the balance in thirty-nine (39) equal installments, with interest at the rate of three (3) per cent per annum, he executed and delivered his obligations in terms required by the laws of the State.

Both of said sections of land belonged to the class of public school lands, designated by the law, as isolated and detached sections or fractions of sections at the time plaintiff in error made his applications to purchase the same. Both sections of land, before they become a part of the class of public school lands, designated by law, as isolated and detached, and while yet a part of that class of public school lands, which is saleable to actual settlers only, had been classified by the Commissioner of the General Land Office—the one as pine timber land and valued at eight dollars ($8.00) per acre and the other as grazing land and valued at two dollars ($2.00) per acre.

The Commissioner refused to award the lands to the applicant, alleging as a reason for his refusal the following grounds:

1. Because the two (2) parcels of land having been classified respectively as timber and grazing land, and not as agricultural land, the law did not authorize him to sell them at the price of one dollar ($1.00) per acre.

2. That even if he was permitted to sell the land at the price of one dollar ($1.00) per acre, the law invested him with a discretion to accept or refuse such offer.

3. That it would be inequitable and unjust to the State to compel him to award said land for the price of one dollar ($1.00) per acre, when it had been appraised, respectively, at eight dollars ($8.00) and two dollars and a half ($2.50) per acre.

4. That the section designated as grazing land, in Jefferson County, had been sold by the State in 1897 to one Winburn, and that by reason of the failure of said purchaser to pay the annual interest his said purchase was declared forfeited, as required by law, and that thereupon the land reverted to the State. That since such forfeiture the land had not been placed on the market for resale, and hence it was not subject to purchase by anyone.

Upon these legal contentions issue was joined and the Supreme Court of Texas, upon briefs and oral arguments of both parties, on January 22d, 1900, held that plaintiff in eror was entitled to the award of the two (2) parcels of land and ordered that a writ of mandamus be issued, directing the Commissioner of the General Land Office to make the award.

The court delivered the following opinion:

P. O. WEBER, Relator,
vs.
CHARLES ROGAN, Commissioner, Respondent.
No. 838. Petition for Mandamus.

This is an original action for a writ of mandamus brought by the relator against the Commissioner of the Land Office to compel the respondent to award to the relator two parcels of school lands which he had made application to purchase. The allegations in the petition are not denied. From these allegations it appears that on the 11th day of August, 1899, the two tracts of land—one lying in Jefferson County, and

consiting of 320 acres, and the other situate in Polk County, and embracing 640 acres—were unappropriated public free school lands, and were "isolated and detached" within the meaning of the Act of May, 1897, with reference to the sale of the public free school lands; and that on that day the relator filed an application to purchase each of these parcels at the price of $1.00 per acre. Each of these applications was in due form and was accompanied by a tender of one-fortieth of the purchase money and by the relator's obligation for the payment of the balance as provided by the law then in force. It was also averred that the respondent had refused to award him the lands. The respondent for answer admits that the relator made application to purchase the lands, as averred by him in his petition, but avers in substance that under the law in force at the time applications were made the section in Polk County had been classified as timbered land, and had been appraised at $8.00 per acre, and also that the half section had been classified as grazing land and had been appraised at $2.50. He claimed that because they were not agricultural lands they were not subject to sale as "isolated and detached sections" under the law existing at the time applications were made. In regard to the latter tract, it was also averred that it had previously been sold, but that he, as Commissioner of the General Land Office, on the 20th day of July, 1899, had declared the title of the purchaser forfeited for non-payment of interest, and that he did not again place it upon the market until the 1st of September thereafter. He therefore claimed that at the time of the application that the tract last mentioned was not subject to sale, for the reason that it had not been again placed upon the market. The allegations of the answer were excepted to, but were not denied.

At the time applications to purchase were made, the following law was in force: "The Commissioner of the Gen-

eral Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter. (2 Batts' Rev. Stats, art. 4218y.)

The determination of the case before us depends upon the construction of this statute.

If by this law it is made the imperative duty of the Commismissioner of the General Land Office to sell all isolated sections and parts of sections of the public free school lands to the first applicant without regard to their classification, then the writ here applied for should be awarded; otherwise it should be denied.

Upon first impression we were inclined to the opinion that the provision in question was directory and not mandatory. We recognize the rule announced by the late Chief Justice Stayton, in Smisson vs. The State (71 Texas, 236), in the following language: "The word 'may' in the connection used in the sixteenth section was doubtless used in the sense of 'shall,' and therefore was mandatory. Such is the settled construction where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer,

unless the context shows that the word was used in its primary signification." The difficulty with the article is that the context tends in some degree to show that the word "may" in the last provision was used in its primary sense. The article begins by using the same word in the sense of permission, then it uses the word "shall"—an undoubted word of command--and then returns to the use of the word "may."

If we had nothing but the letter of the article to throw light upon the intention of the Legislature, we therefore think it would be difficult to say that the word "may" was not used in the same sense in the second instance as it was used in the first. But when we review the history of the provision, the difficulty disappears. The provision for the sale of "the isolated and detached" sections or parts of sections of the public free school lands first appeared as section 22 of the Act of April 1, 1887, in relation to the classification, lease and sale of the State's lands set apart for the benefit of the free schools, the university and the asylums of the State. That section reads as follows: "The Commissioner of the General Land Office, under the direction of the Governor, may withhold from lease any agricultural lands necessary for the purposes of settlement, or, in his discretion, he may lease such agricultural lands in small quantities for a less period than five years, as the public interest and development of the country may seem to require ;and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Pecos and Presidio Counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, at not less

than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe." This section was amended by section 26 of the Act of May 4, 1895, but so much thereof as related to the sale of detached sections was left unchanged. Section 26 appears in the Revised Statutes of 1895 as article 4218y. It was amended in 1897, and, as so amended, was the law in force at the time the relator applied for the purchase of the lands in controversy. It thus appears that until this article was amended by the act of 1897, the Commissioner had the discretion both as to the terms of the sale and as to the price, subject, however, to a minimum limit. The article so amended took away all discretion as to the terms of the sale by providing that the sale should be "upon the same terms as other public lands are sold under the provisions of this chapter."

(The chapter meant is chapter XII, A of title LXXXVII.) And it is very clear to our minds that if it had not been intended to take away all the discretion as to the price, the Legislature, instead of using the words "at one dollar per acre," would have said "at not less than one dollar per acre"—the form of expression used in the very article they were amending. By changing the language from the words "not less than two dollars per acre" to the words "at one dollar per acre," they must have intended not only to reduce the minimum to one dollar per acre, but also to fix the price at that sum. Such seems to have been the construction put upon the act by the next Legislature, for in 1899 the article was again amended so as to read, "at not less than one dollar," etc. (Laws of 1899, p. 235.) This last act had not gone into effect when the applications to purchase in this case were made.

It is to be observed that the provision in question only applied to lands lying in counties which had been organized before January 1st, 1875. Isolated sections and parts of sec-

tions of such lands had long been upon the market when the act which embraced this provision was passed, and had remained unsold. The presumption was that they were of little value and not marketable under the general provisions of the act. They were like the unsold remnants of a stock of merchandise—not sold because not saleable upon the terms and conditions upon which the bulk of the stock had been sold. This consideration doubtless impelled the Legislature to enact the special provision for the sale of detached lands. Therefore, in the original act, they removed all restrictions save as to a minimum price, and provided that such lands should be sold at such price not below $2.00 per acre, and upon such terms as the Commission of the Land Office might prescribe. It was ten years after the passage of the first act which conferred this power upon the Commissioner that the amendment was passed which was in force when the relator made application to purchase the lands in controversy in this case. The consideration which led to the first action of the Legislature bore with greater force at the time the amendment was adopted. The Legislature doubtless then felt that the previous law had been inadequate for the disposition of these remnants of public free school lands, and that to effect a sale it was necessary not only to lower but to fix the price, and take away all discretion in the premises from the Commissioner. The history of the legislation and the circumstances surrounding its subject-matter impel to the conclusion that the purpose of the Twenty-fifth Legislature, in passing the amendment of 1897, was to make it the duty of the Commissioner of the General Land Office to accept all bids for isolated sections and parts of sections of the school lands at $1.00 per acre, upon the purchasers tendering the part of the purchase money and the obligation for the balance, as was required by the general law.

But it is urgently contended that the provision applies only to agricultural lands, and that since the parcels in question have been classified, the one as timbered and the other as grazing lands, the relator acquired no right by his applications. This contention is based upon the fact that the first provision in the article is expressly applicable to agricultural lands. The argument is that this shows that in adopting the article in question, the Legislature had in mind only the agricultural lands, and that therefore the words "all sections and fractions of sections" meant all sections and fractional sections of agricultural lands. We can not concur in the proposition. We attach no importance to the fact that the provision about agricultural lands and that about detached parcels are found in the section of the law. It is undoubtedly the custom to embrace provisions relating to divers matters in the same section or article of a statute, and there can be no objection to the practice provided all relate to the same general subject named in the title of the act. In the provision in controversy, the Legislature says, "all sections and fractions of sections," and the words mean literally all such sections and fractions, without regard to their classification as agricultural, grazing or timbered lands. We think they meant what they said. In the original act, the section which contains the provision as to isolated and detached lands is nearly the last. The previous twenty-one sections contained full regulations for the sale and lease of the free school and asylum lands. When this was done, there remained certain exceptions to be provided. The Constitution required the lands to be sold, and hence it was deemed proper to authorize such of them to be held for sale as were in immediate demand for actual settlement. Also, as has been previously shown, in order to effect a sale of "isolated and detached sections and fractions of sections" of the lands, it

was expedient to except them from the general rule and to make special provision for the sale thereof. Not only was there no incongruity in providing for both of these exceptions in one section, but it seems to us that it was a natural and logical method of making the provisions. In the original section perhaps the most important provision in regard to the isolated lands is that any person, not a corporation, could be a purchaser. All other lands were to be sold to actual settlers only. Surely the lands most desirable for settlement and most likely to be applied for by actual settlers were those adapted to the purposes of agriculture. It therefore seems to us that if the Legislature had desired to except either class from the operation of the provision, the agricultural lands are the last they would have excepted, for so far as we can see every consideration which impelled them to except the isolated and detached sections from the general rule laid down by the statute applied with more force to the timbered and grazing lands than to the agricultural sections.

But as to the half section situate in Jefferson County there is another question to be determined. After the Commissioner had declared that parcel forfeited, was it necessary that the forfeiture should be reported to the County Clerk of the county in which the land is situate before it was again subject to purchase? The provisions in general of the chapter regulating the sale of the public school and asylum lands do not apply to the "isolated and detached sections and fractions of sections." As already seen, they required no classification, nor was any appraisement necessary as a condition precedent to their sale. Before the amendment of 1897, the Commissioner fixed the price at not less than $2.00 per acre. Under that amendment, the law fixed it absolutely at $1.00, and directed that the lands should be sold upon the same terms as other public lands were sold, under the provisions of the

chapter of which it was made a part. By "terms" are meant the times of the payment of the installments of the purchase money and the rate of interest on the deferred payments. It does not mean under the same regulations, because, as we have seen, no regulations were necessary. The law having fixed the price and terms of sale, all that was necessary to acquire an inchoate title was to make application to the Commissioner and to tender the proportion of the purchase money required by the law to be paid in cash, together with the statutory obligation for the balance. (Jumbo Cattle Co. vs. Bacon & Graves, 79 Texas, 5.)

We think the writ of mandamus should issue as prayed for, and it is accordingly so ordered.

R. R. GAINES, Chief Justice.

(Rec., pp. 12-18.)

On February 3d, 1900, the respondent filed a motion for new trial, called motion for rehearing in the Supreme Court of Texas, and on the 8th of March, 1900, the court rendered the following opinion, granting said motion: (Rec., pp. 18-20.)

Opinion Granting Motion for Rehearing.

P. O. WEBER, Relator,
vs.
CHARLES ROGAN, Commissioner, Respondent.
} No. 740. Petition for Mandamus.

The motion and argument for a rehearing contains much matter which would have been very properly addressed to the Legislature while it had under consideration the statute which gave rise to this suit, but which is hardly proper to address to a court which is called upon to construe the law. If there was any provision of the Constitution which prohibits the Legislature from passing improvident laws, we would most likely be amply justified in disregarding the law in question.

However, the motion calls our attention to certain provisions of the Revised Statutes in relation to the sale of timber upon the school lands and the timber land themselves, which are claimed to be inconsistent with the idea that the article in reference to "isolated and detached" sections was intended to apply to the timbered lands. This presents a point which was not presented upon the argument at the hearing, and upon which further argument is appropriate. The motion for a rehearing is therefore granted, and the cause will be set down for argument upon such day as may be agreed upon by the parties, with the consent of the court.

R. R. GAINES, Chief Justice.

Judgment Granting Motion for Rehearing.

P. O. WEBER, Relator, vs. CHARLES ROGAN, Commissioner, Respondent.	Motion No. 740. Petition for Mandamus.

Opinion delivered by Chief Justice Gaines:

In this cause it is ordered that the motion of the respondent for a rehearing be granted, that the judgment heretofore entered on January 22d, 1900, be set aside and the cause be set down for argument on point indicated in the opinion this day filed, for some day to be agreed upon by counsel, with the consent of the court. (Rec., pp. 19, 20.)

The case was again argued and resubmitted, and on June 28th, 1900, the court rendered the following opinion, refusing the writ of mandamus:

P. O. WEBER, Relator, vs. CHARLES ROGAN, Commissioner, Respondent.	No. 838. Petition for Mandamus.

The argument for the respondent, upon the second submission of this case, has placed the matter in a new light, and

has led us to the conclusion that our former judgment was erroneous and that the writ of mandamus should be denied.

Our opinion is, that even if it be held that article 4218y applies to all lands alike, and if it takes away the discretion of the Commissioner of the General Land Office to refuse a bid of $1.00 per acre, yet the relator can not have a judgment in this case as to the timbered section. That article prescribes that the lands therein designated shall be sold "upon the same terms as other public lands are sold under the provisions of this chapter." There are no provisions in the chapter mentioned which are applicable to all lands alike . Timbered lands are to be sold for cash and agricultural and pasture lands upon a long credit. So that, if the timbered sections be included in the article under consideration, the provision quoted admits of no reasonable construction save that the timbered sections are required to be sold as other timbered lands are authorized to be sold, under the provisions of the chapter, and the agricultural and pasture lands are to be sold as is provided in other articles for the sale of such lands; that is to say, the former for cash and the latter in equal annual installments extending over many years. This seems to us to be fatal in any event to the claim of the relator to the timbered section. If he had the absolute right to purchase the timbered section at $1.00 per acre, he could in no event have perfected his right to that land except by tendering the purchase money in full. This he did not do.

But as to the half section of pasture land, the case is different. Under the statute the pasture lands are saleable upon the same general terms as agricultural lands; and the relator having tendered one-fortieth of the purchase money and his obligation for the payment of the thirty-nine additional annual installments, as required by the statute for the sale of such lands, was entitled to have the land awarded to him, provided

the respondent was absolutely required to sell the land at $1.00 per acre. Therefore our conclusion as to the timbered section does not relieve us from the duty of reviewing our opinion upon the more important question and of determining whether or not the Commissioner, under article 4218y, had a discretion to refuse an offer of $1.00 per acre for sections of land which were isolated and detached.

In our former opinion, we held in effect that the fact that the article under construction omitted the words "not less than" from section 22 of the Act of April 1, 1887, of which such article was an amendment, and for which it was a substitute, led to the conclusion that the purpose was to take from the Commissioner of the General Land Office the discretion with which he was previously invested to refuse the minimum price. The majority of the court are now of the opinion that we erred in that conclusion. The rule is recognized that in the construction of statutes the history of previous legislation upon the subject should be considered, and that a change of language of a statute by the omission or addition of one or more words should ordinarily be presumed to have been made for a purpose. But the one controlling and effective rule of construction is that the intent of the Legislature must govern. Every other recognized rule is subsidiary to this fandamental canon of construction, and must yield when it is believed that its application would lead to a result contrary to that which the Legislature actually intended. While the omission of the words "not less than" in the article we are considering tends to show that it was the intention of the Legislature to deprive the Commissioner of the power of fixing the price of isolated sections, it is not necessarily conclusive of that question. As indicated in our former opinion, if article 4218y of the Act of 1887 had been the first provision upon the subject of the sale of isolated sections of the free

school lands, we should have felt constrained to hold that the word "may," as there used, was employed in the sense of permission and not of command, and this notwithstanding the well recognized rule announced in the case of Smisson vs. The State, there cited. Though it is a matter "in which the public have an interest to be * * * promoted by the exercise of a power * * * by a public officer," and though in such a case it is the ordinary rule to construe "may" as meaning "shall," yet we thought that the context indicated that such was not the purpose. Such being the case, it is not unreasonable to presume that the Legislature may have intended to use the word "may" in the ordinary sense of permission, and have demed it unnecessary to retain the words which were omitted in the former act. In that act, the word in question could not have been employed as a word of command, for the reason that by other terms employed, the officer was empowered to reject any offer in the event he deemed the price offered less than the value of the land.

Now it is to be noted that in every statute that has been passed which provides for the sale of the public lands, from the year 1883 down to the passage of the article under consideration, especial provision has been made for the sale of those which are chiefly valuable for the timber upon them. The Act of April 12th, 1883, provided that such lands should not be sold at less than $5.00 per acre, while other lands without water upon them were saleable at a minimum price of $2.00, and those with water at $3.00 per acre. (Laws of 1883, p. 85.) Substantially the same provision is found in section 7 of the Act of April 1, 1887. (Laws of 1887, p. 85.) That act also provides in substance that timbered lands shall be paid for in cash. The sections which contained these provisions were not amended by the Act of April 8th, 1889 (Laws of 1889, p. 50), nor by that of April 29th, 1891. (Laws of 1891, p. 180.)

By the Act of April, 1895, the minimum price of agricultural lands was reduced to $2.00, and that of pasture lands to $1.00 per acre; but the minimum price of timbered land was left at $5.00, as previously fixed. This act also retained the provision that such lands should be sold for cash only. (Laws of 1895, p. 61.) It also added the following section: "Section 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than $5.00 per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or parts of sections at its proper value; provided such timber is sold at not less than $2.00 per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications made by the Land Commissioner. Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at $2.00 per acre cash at any time before the expiration of five years from date of purchase of timber under the provisions of this act."

All these provisions in relation to the sale of timbered lands and of the timber thereon were retained in the Act of May, 1897, of which article 4218y constitutes a part. Now, conceding, for the purposes of the argument, that the previous laws

in regard to the sale of the detached sections applied to pasture and timbered lands as well as to agricultural lands, such provisions are not inconsistent with the previous policy of the law in relation to timbered land as shown by our legislation upon the subject for the reason that before the Act of 1897, the Commissioner was not bound to sell at a fixed sum, but had the liberty to refuse any offer which in his opinion was less than the value of the land. Rare instances might exist in which a tract might not be worth more than the minimum fixed by the act. In such cases, he was empowered to sell at that price; but it was not to be presumed that he would sell any land at less than its actual value. But to say that it was the intention of the Legislature in making the amendment not only to reduce the minimum price of the isolated sections one-half of what it had been under the previous law, but also to deprive the Commissioner of all discretion and to make it his absolute duty to sell at that price, is to attribute to them a purpose to make a radical departure from the previous course of legislation upon the subject and to attach a value to detached sections of timbered lands in no degree consistent with the value fixed by them and other Legislatures upon timbered lands when not detached.

What may be the actual value of these detached lands we do not know; nor have we the means of ascertaining their value. It appears, however, in this case, that the timbered section in controversy had been lawfully appraised at $8.00 per acre; and from this the presumption may be indulged that there were other sections which had been appraised at more, and which were worth much more than $1.00 per acre. Under these circumstances to hold that the Legislature intended to force the sale of these detached sections merely because they were detached at 20 per cent of the price put upon timbered lands generally is to attribute to them a degree of improvi-

dence which ought not to be imputed when the language of the statute admits of any other reasonable construction.

For these reasons the majority of the court are of the opinion that the word "may" in article 4218y of the Revised Statutes ought to be construed in its literal sense—that is to say, as a word merely conferring a power upon the Commissioner to sell the lands therein specified at $1.00 per acre, and not making it obligatory upon him to do so. I incline to our former opinion, but am also inclined to concur in the result, but upon a different ground. But since my views are not those of the majority of the court, it would serve no useful purpose to express them here.

The writ of mandamus is denied.

R. R. GAINES, Chief Justice.

(Rec., pp. 21-24.)

On July 11th, 1900, plaintiff in error filed his motion for new trial, styled "Motion for Rehearing in the Supreme Court of Texas," in which he set forth various grounds to show the error of the court in the conclusions reached by it, and among which was the following:

By article 4218y of the Act of 1897, the State of Texas offers to sell all isolated and detached sections and fractions of sections of public school land situated in counties organized prior to January, 1875, except in the counties of Presidio, El Paso and Pecos, to any purchaser who will offer $1.00 per acre therefor, payable one-fortieth cash and the balance in forty equal settlements, with interest thereon at the rate of 3 per cent per annum, and who will execute his obligation for the deferred payments. Whenever this offer by the State is accepted it becomes an executory contract between the State and such purchaser. It was error of this court therefore to hold that the Commissioner of the General Land Office might refuse to execute this contract by declining to award such

purchaser the lands applied for, for by so holding the court gives to the statute an interpretation which violates the obligation of this contract and is repugnant to article 1, section 10, of the Constitution of the United States, forbidding the impairment of the obligation of contracts. (Rec., pp. 25-29.)

This motion was considered by the Supreme Court of Texas, and on the 18th of October the court entered an order that said motion be overruled. (Rec., p. 29.)

Assignments of Error.

1. Now comes P. O. Weber, plaintiff in error, by his attorney, M. E. Kleberg, and says that in the record and proceedings aforesaid there is manifest error in the judgment and decision of the Supreme Court of Texas, to wit:

The Supreme Court of Texas erred in holding that section 26 of the Act of the Legislature of Texas of 1895, as amended by the Act of 1897, known as article 4218y of the Revised Statutes of Texas, invests the Commissioner of the General Land Office of Texas with any discretion to accept or reject an offer of $1.00 per acre for the lands described in said section of the law; and in not holding that by said section the law offers for sale all such isolated and detached sections of school land at the fixed price of $1.00 per acre, and that when the said offer is accepted by any person, in the terms of the law, that the same constitutes a complete contract between such purchaser and the State of Texas, which the Commissioner has no power or right to change, abridge or deny.

2. By section 26 of the Act of the Texas Legislature of 1895, as amended by the Act of 1897, being article 4218y of the Revised Statutes of Texas, the State of Texas offered to sell all isolated and detached sections and fractions of sections of public school lands situated in counties organized prior to January, 1875, except in the counties of Presidio, El Paso

and Pecos, to any purchaser who would offer $1.00 per acre therefor, payable one-fortieth (1-40) cash and the balance in thirty-nine equal installments, with interest thereon at the rate of 3 per cent per annum, and who would execute his obligation for such deferred payments. When this offer by the State was accepted, as was done by the plaintiff in error in the case at bar, such acceptance, as had been theretofore held in former decisions by the Supreme Court of Texas, constituted a contract between the State and such purchaser; and it was error of the Supreme Court of the State of Texas to hold that the Commissioner of the General Land Office might refuse to execute said contract by declining to award such purchaser the lands applied for; for by so holding the court gave to the statute an interpretation which violates the obligation of a contract, and is repugnant to article 1, section 10, of the Constitution of the United States forbidding the impairment of the obligation of contracts. For the reasons assigned the said P. O. Weber prays that the judgment of the Supreme Court of Texas be reversed, and that the above-styled cause may be remanded to said Supreme Court with directions to issue its writ of mandamus to Charles Rogan, Commissioner of the General Land Office of the State of Texas, instructing him forthwith to make an award of sale of the lands applied for to plaintiff in error.

The questions arising in this case may be briefly stated as follows:

1. Does the case involve a Federal question so as to give this court jurisdiction to review the decision and judgment of the Supreme Court of Texas?

2. If such Federal question exists, does the record show that it was properly raised, and that it was decided adversely to plaintiff in error?

3. Under the facts of the case and the law applicable thereto, was plaintiff in error entitled to a writ of mandamus, directing the Commissioner of the General Land Office of the State of Texas to make an award to him of the two sections of land which he sought to purchase?

BRIEF OF ARGUMENT.

Does the case present a Federal question?

By section 4 of article 7, of the Constitution of the State of Texas of 1876, in force since the 18th day of April, 1876, it is provided that all public lands set apart to the public free school fund shall be sold under such regulations, at such times, and on such terms, as may be prescribed by law. Under this authority the Legislature, by various acts, provided for the sale of the public free school lands, all of which acts, however, were superceded by the Act of 1887, which provided an elaborate system for selling all of the public school lands of the State. (Gen. Laws of Texas of 1877, p. 84 et seq.)

The Act of 1887, just cited, was repealed by the Act of 1895. (General Laws of the State of Texas of 1895, pp. 63 et seq.)

But the latter act retained the general system of the Act of 1887, requiring the sale of the lands.

This system so far as the same is material to the present inquiry is substantially as follows:

Any person desiring to purchase public school lands is required to forward his application to the Commissioner of the General Land Office describing the land sought to be purchased, and to accompany the same with his affidavit stating in effect that he desires to purchase the land for a home, and has in good faith settled thereon; that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. The pur-

chaser shall transmit to the Treasurer of the State one-fortieth of the actual purchase money due for the land purchased by him, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay the balance of the purchase money in thirty-nine equal annual installments, with interest thereon at the rate of 3 per cent per annum. Upon receipt of one-fortieth of the purchase money by the Treasurer and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and application are filed in the General Land Office. (Sec. 9, Acts of 1895, pp. 65. See appendix of this Brief.)

The forms of application, affidavit and obligation to be used by any purchaser desiring to buy lands are required to be prepared by the Commissioner of the General Land Office and by the Attorney General of Texas. (Sec. 2, Acts of 1895, p. 63. See appendix of this Brief.)

In the event the land sought to be purchased is situated in counties organized prior to the 1st day of January, 1875, and is detached and isolated from other public lands, the affidavit of the purchaser is not required to state that he desired to buy the lands for the purpose of a home, but only that he is buying the land for his own use, and not for any other person or corporation. (Rec., pp. 7, 10; Sayles' Real Estate Laws Vol. 1, pp. 405-408, art. 412.)

Public school lands, except such as are detached and issolated are saleable to actual settlers only on terms fixed by the statutes.

Section 26 of the Act of 1895 provides that all sections or fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Pecos and Presidio Counties, which sections are detached and isolated from other

public lands, may be sold to any purchaser, except to a corpotion, without actual settlement, at not less than $2.00 per acre, upon such terms as the Commissioner of the General Land Office may prescribe. (Sec. 26, Act of 1895. See appendix of this brief.) The Act of 1895 was transferred by the codifiers to the Revised Statutes of Texas of 1895, and section 26 thereof appears therein as article 4218y. Article 4218y of the Revised Statutes was amended by the Act of 1897 to read as follows:

All sections and fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at $1.00 per acre, upon the same terms as other public lands are sold under the provision of this chapter. (General Laws of Texas of 1897, p. 187.)

This amendment made two important changes regarding the sale of detached and isolated lands:

1. The lands were required to be sold to any purchaser except a corporation at the fixed price of $1.00.

2. The terms of sale were the same as those upon which other public land was sold, and not such as the Commissioner of the General Land Office might prescribe.

While this law was in force plaintiff in error made his application to purchase the land described in his petition. (Rec., pp. 7, 10.)

The Act of 1897, amending article 4218y of the Revised Statutes of Texas, was again amended by the Act of 1899, so as to read as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if,

in the judgment of the Commissioner, they may be in immediate demand for settlement; but such lands shall be held for settlement and sold to actual settlers only under the provisions of this chapter; and all surveys and fractions of surveys in all counties organized prior to the 1st day of January, 1875, which surveys are isolated and detached from other surveyed school lands, may be sold to any purchaser, except to a corporation, without actual settlement at not less than $1.00 per acre, upon the same terms as other public lands are sold under the provisions of chapter 129 of the Acts of 1897.

"Section 2. The fact that a great deal of the lands mentioned herein are valuable, and the present law would seem to prevent the sales of them for more than $1.00 per acre, except in cases of voluntary offer, to the detriment of the school fund, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted." (General Laws of Texas of 1899, p. 235.)

It thus appears that by the Act of 1895 detached and isolated school lands might be sold by the Commissioner of the General Land Office at not less than $2.00 per acre. So, too, was the law providing for the sale of these particular kind of school lands under the Act of 1887. **(Sec. 22 of the Act of 1887, General Laws of Texas, p. 84.)**

The terms upon which these lands were to be sold were entirely in the discretion of the Commissioner of the General Land Office, that officer being invested with full power to prescribe any terms he might see fit.

Then came the Act of 1897, by which the law governing the sale of isolated and detached school lands was most materially changed.

In the first place the provision of the former law which required that such land should not be sold at less than $2.00 per acre was so changed so as to direct them to be sold at the fixed price of $1.00 per acre. The minimum price fixed by the former law was entirely abolished, and the absolute price of $1.00 per acre was placed upon the lands by the law, so that no discretion was left to the Commissioner to fix the price upon this class of lands. The law itself fixed the price at $1.00 per acre.

In the second place, the Commissioner was deprived of all and every discretion in fixing the terms upon which this land should be sold. The former law provided that the sale should be upon such terms as the Commissioner of the General Land Office might prescribe. The amendment took away this discretion from the Commissioner and provided that the sale should be upon the same terms as other public lands are sold.

While the provisions of the Act of 1897 making the aforesaid important changes in the sale of detached and isolated lands were yet in force, plaintiff in error made his application to the Commissioner of the General Land Office for the purchase of the two tracts of land described in his petition.

It is admitted that the application was in due form; in fact was made upon a form prepared by the Commissioner and Attorney General. It is also admitted that the affidavit and obligation required by law were duly executed and filed with the Commissioner of the General Land Office as the law required, and that one-fortieth of the purchase money was promptly paid to the Treasurer of the State of Texas. In other words, all the conditions of the law were fulfilled, and the purchaser was entitled to an award of the lands unless the Commissioner was invested with a discretion to refuse the award.

In the first opinion rendered by the Supreme Court of Texas upon this point it was held that the plaintiff in error having complied with the terms of the law was entitled to have the lands in question awarded to him. That the Legislature intended by Act of 1897 to so amend the former laws upon this subject as to deprive the Commissioner of any discretion whatever.

That the law itself made an offer to sell isolated and detached lands to any person who agreed to pay therefor the price of $1.00 per acre and execute the affidavit and obligation which the law required in the sale of those school lands which were not isolated and detached, and were devoted to actual settlers only, and that whenever a person agreed to pay said price and executed said affidavit and obligation the contract between him and the State of Texas was complete and might not be violated by the Commissioner of the General Land Office, or any one else. To make clear that such was the meaning of the law the court in its opinion cited the Act of 1899, by which the "Act of 1897 was so changed as to require isolated and detached lands to be sold **at not less** than $1.00 per acre. (See opinion of Supreme Court of Texas, Rec., pp. 12-17.)

By its second opinion the Supreme Court of Texas modifies its first opinion and holds (at least so far as the grazing section of land is concerned) that the Act of 1897 means the same as the Act of 1899, which amended and changed it, and by so holding gives to Act of 1899 a retroactive effect so as to make it violative of the contract made by the plaintiff in error under the Act of 1897 with the State of Texas, by which contract he was entitled to an award of the lands which he purchased.

The Supreme Court of Texas therefore by its judgment under its last opinion gives effect to the subsequent statute

before it was in force, and thereby impairs the contract which plaintiff had made under the former law for the purchase of the lands for which he seeks an award.

It is urged that this court has no jurisdiction of this case for the reason that the Supreme Court of Texas in its last opinion does not consider the subsequent legislation by the State with the view of impairing the contract made under the Act of 1897, but limits itself to a consideration of that act and holds that because of a discretion vested in the Commissioner to reject applications for the purchase of this class of lands, no contract existed with plaintiff in error.

Now we understand the true principle of law to be that if the judgment of the state court gives no effect to the subsequent law of the State, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract.

Now it is true that the Supreme Court of Texas in its first opinion refers to the amending Act of 1899 only once to show the true meaning of the Act of 1897 and the change which was intended to be made by the Act of 1899, and places its decision in its last opinion distinctly on the ground that no contract existed between plaintiff in error and the State, notwithstanding his compliance with all the requirements of the statute. But at the same time it would appear to be equally clear that the judgment of the Supreme Court of Texas under its last opinion gives effect to the subsequent statute —a retroactive effect—whereby plaintiff in error's contract was violated, and it has been repeatedly held by this court that in reviewing the judgment of a state court it is not limited to a mere consideration of the language used in the opinion of the State Court, but may examine and determine what is the real substance and effect of the decision, and should this court

find that the effect of such decision is to give such force to subsequent legislation as to impair contracts made under former legislation, then a Federal question is presented, of which this court will take jurisdiction. (**McCullough vs Virginia, 172 U. S., pp. 102, 116, 117; Houston & Texas Central R. R. Co. vs. Texas, 177 U. S., p. 74.**)

We submit therefore that under the principles announced in the foregoing cases this court has jurisdiction in the case at bar.

Does the record show that the Federal question was properly raised and that it was decided adversely to plaintiff in error?

It must be remembered that this case was one of original and final jurisdiction in the Supreme Court of Texas, in so far as the courts of this State are concerned. Such is the recognized law of the State of Texas. (**Pickle vs. McCall, 86 Texas, p. 212.**)

In his petition for a writ of mandamus against the Commissioner of the General Land Office, plaintiff in error distinctly alleges and asserts that by virtue of his acceptance of the terms and price for which by law the lands in question were offered for sale, and by virtue of the filing of his application, affidavit and obligation with the Commissioner of the General Land Office under the terms prescribed by the law and the payment by him to the State Treasurer at the same time of the several sums of money due the State of Texas for the lands, he became in law the purchaser of said two sections of land, and that the Commissioner of the General Land Office was without authority to withhold from him an award therefor. (**Rec., pp. 2, 3.**)

Upon this petition and the answer of defendant in error the Supreme Court of Texas held the plaintiff in error was correct in his contention, and directed that the writ of mandamus be

issued commanding the Commissioner to award the lands. **(Rec., pp. 12 to 17.)**

Within the time allowed by the rules of the court, defendant in error filed a motion for rehearing. **(Rec., p. 19.)** This motion was granted by the court, at least as far as the timber section of land is concerned. **(Rec., pp. 12, 22.)**

Upon re-argument this court delivered a second opinion, by which it modified its first opinion by holding that plaintiff in error had not complied with the law in his offer for the timber section, and for that reason was not entitled to have an award therefor. That as to the grazing section his offer was in compliance with the statute, and that he was entitled to have said section awarded unless the Commissioner of the General Land Office was by law invested with a discretion to refuse the award if he so desired.

Upon the latter point the court concluded that the Commissioner had such discretion, and for that reason his refusal to make the award was not subject to judicial review. For these reasons the writ of mandamus was denied. **(Rec., pp. 21 to 24.)**

Thereupon plaintiff in error filed his motion to set aside said second opinion and the judgment thereunder, and to grant a new hearing, setting forth specifically the grounds for such a rehearing, one of which was that the court in its second opinion, and the judgment thereunder, gave to the statutes an interpretation which impaired the obligation of a contract existing between plaintiff in error and the State of Texas, and which contract was made by the acceptance by plaintiff in error of the offer for sale made by the State of the lands in question, and complying with the terms of said offer. **(Rec., p. 29.)**

It will be observed that the judgment refusing the writ of mandamus, rendered by the Supreme Court of Texas under its second opinion, was the first time that plaintiff in error had

grounds to complain of the action of the court, and that by his motion to correct said judgment he promptly pleaded his right to have his contract with the State of Texas protected by the Federal Constitution.

This motion coming on to be heard, the court rendered thereon the following judgment: **(Rec., p. 29.)**

P. O. WEBER, Relator, vs. CHARLES ROGAN, Commissioner, Respondent.	No. 798. Petition for Mandamus

This day came on to be heard the motion of the relator for a rehearing, and the same having been duly considered, it is ordered that said motion be overruled; that the relator, P. O. Weber, pay all costs of this motion.

It thus appears that plaintiff in error raised the Federal question in the case at bar by his petition, as well as by motion at the first opportunity which presented itself, and as soon as the rulings of the court were adverse to him. It will also be seen that the line of decisions made in this court holding that a writ of error to a state court will not lie where the Federal question is raised for the first time in the appellate court by motion for rehearing, is not applicable to the case at bar, for the reason that in the trial and decision of the case at bar the Supreme Court of Texas was not an appellate court, but a court of original jurisdiction of the first instance, and that plaintiff in error could not anticipate a denial by that court of his rights under the Federal Constitution. Hence, as in any other trial court, when the judgment denied to him this right he promptly complained thereof by his motion to set aside this judgment. This motion the Supreme Court of Texas did not dismiss or refuse to consider, but as shown by its judgment thereon, heretofore cited, duly considered and then overruled. In other words, the Supreme Court of Texas having duly con-

sidered the motion of plaintiff in error wherein he complains that the contract existing between him and the State of Texas was impaired, decided against him. (**Mallett vs. North Carolina, 181 U. S., pp. 591, 592.**)

For the reasons herein stated and the principle announced in the case last cited, we believe the Federal question in this case was properly and timely raised and presented in the trial court and decided adversely to plaintiff in error.

Under the facts of the case and the law applicable thereto, was plaintiff in error entitled to a writ of mandamus directing the Commissioner of the General Land Office of the State of Texas to make an award to him of the two sections of land which he sought to purchase?

If this court concludes that it has jurisdiction to hear and determine this case, then it follows that it will determine for itself the proper construction of the Texas statutes in question.

"While it is undoubtedly the general rule of this court to accept the construction placed by the court of a State upon its statutes, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired." (**McCullough vs. Virginia, 172 U. S., pp. 109, 110,** and cases therein cited.)

We might content ourselves to rest the argument as to the proper construction of the statutes in question upon the first opinion delivered by the Supreme Court of Texas in this case, for it seems to us quite apparent, that by placing the two opinions in juxtaposition, the falsity of the reasoning in the second opinion becomes most evident.

We submit, however, the following considerations which we believe further support the grounds of the first opinion and judgment of the court:

By the Constitution of the State of 1876 the Legislature is required to pass laws providing for the sale of all public

school and asylum lands of the State of Texas. In pursuance of this authority and command various acts of the Legislature providing for the sale of these lands were passed. All of these, however, were repealed by the Act of 1887, hereinbefore cited. This act, besides providing for an elaborate system regulating the sale of the public school lands, for the first time contained a provision in the 22d section thereof which placed isolated and detached lands upon a different footing from the other public school lands.

While public school lands generally could be sold to actual settlers only in quantity not exceeding four sections as to pasture lands which were without water, and in quantities not exceeding one section as to timber and agricultural lands, isolated and detached lands might be sold to any person without actual settlement and irrespective of quantity. So, the actual settler is required to reside on the land he purchases for at least three consecutive years and to make proper proof of such residence before he can obtain title to the land, even though he had paid the entire purchase price. The price of the land to actual settlers was not to be less than $2.00 per acre, watered sections at not less than $3.00 per acre, and timbered lands at not less than $5.00 per acre.

The law further provides that upon forms prepared by the officers of the State the purchaser shall apply for the lands he desires to buy and make the affidavit to which we have heretofore called attention. He shall pay one-fortieth of the purchase price to the State Treasurer, and execute his obligation to the State for the balance of the purchase money in thirty-nine equal annual installments, bearing interest at the rate of 3 per cent per annum. When he has made this payment to the Treasurer and filed this affidavit and obligation with the Commissioner, his contract is complete and the Commissioner must make an award to him, and is wholly without discre-

tion to refuse to do so. **(Sec. 9 of the Act of 1887, General Laws of Texas.)**

Section 22 of this act reads as follows:

"The Commissioner of the General Land Office, under the direction of the Governor, may withhold from lease any agricultural lands necessary for purposes of settlement, or in his discretion, he may lease such agricultural lands in small quantities for a less period than five years, as the public interest and development of the country may seem to require; and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio Counties, which section are detached and isolated from other public lands, may be sold to any purchaser except to a corporation at not less than $2.00 per acre, upon such terms as the Commissioner of the General Land Office may prescribe."

It will thus be seen that this section of the act grafts an exception upon the general system in so far as the sale of isolated and detached lands is concerned. They are to be sold at not less than $2.00 per acre, upon such terms as the Commissioner of the General Land Office may prescribe; that is to say, that officer may sell the land for cash or part cash and part credit or credit alone for such time as he may see fit.

The Act of 1887 was entirely repealed by the Act of 1895, but the particular provisions which are under construction in this case are the same in both acts, and the Act of 1895, which will be found in full in an appendix to this Brief, in the 26th section thereof, re-enacts sections 22 of the Act of 1887, and

adds thereto the words "without actual settlement." The Act of 1895 was transferred to the "Revised Statutes of Texas, and section 26 thereof appears as article 4218y in said Revised Statutes.

The law thus stood unchanged until 1897, when various amendments to the Act of 1895 were enacted by the Legislature of Texas, and article 4218y of said act was amended so as to read as follows:

"The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the Commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this chapter; and all sections and fractions of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at $1.00 per acre, upon the same terms as other public lands are sold under the provisions of this chapter."

The changes made by this amendment are most obvious. The price of isolated and detached lands is no longer to be left to the discretion of the Commissioner, but is fixed at $1.00 per acre, and any purchaser may buy at that price, though not an actual settler, and the Commissioner must sell to him if he offers the price and terms provided by law. The terms are no longer to be such as the Commissioner may prescribe, but are to be the same as those provided for other public school lands by the provisions of the Act of 1895. It is plain, therefore, that by this amendment the Commissioner was deprived of any discretion in the sale of these lands, and was

charged with the simple ministerial duty of making the award to the purchaser when he paid one-fortieth of the purchase price of $1.00 per acre, and gave his obligation to pay the balance of the purchase money in thirty-nine equal installments, with interest thereon at the rate of 3 per cent per annum. And it was so held by the Supreme Court of Texas in its first opinion rendered in this cause, and up to that time the Courts of Civil Appeals in Texas in cases where their jurisdiction was final, had so construed these statutes.

One of the first cases in which the power of the Commissioner in regard to the sale of school lands generally was discussed is that of Metzler vs. Johnson (1 C. C. A., 139), in which Judge Head, delivering the opinion of the court, says:

"It will thus be seen that while by the terms of the law the Commissioner is to make the sale, yet there is nothing in fact to be done by him save receiving the application, affidavit and obligation of the proposed purchaser. He is nowhere given discretion to accept or reject these papers. The sale is really made by the purchaser accepting the proposition made by the law."

Again, in the case of Watts vs. Wheeler (10 C. C. A., 119), the same justice delivering the opinion of the court upon the construction of the statute regulating the sale and lease of public school lands, aptly remarks:

"If appellee had the right to make the purchase, and complied with the law in his attempt to do so, we do not think that the act of the Commissioner in refusing to award him the land should deprive him thereof. In making these sales, the Commissioner does not seem to have been clothed with discretion to accept or reject applications.

"The offer is made by the law to all alike, and when its terms are accepted the contract is complete."

The principle announced in the above case is approved by

the Supreme Court of Texas in **Jumbo Cattle Company vs. Bacon & Graves (79 Texas, 5)**, where it is said:

"In so far as mere property rights are concerned, we see no difference between the contract of a State and an individual, and a contract between two individuals. When there is an offer made by an act of the Legislature, which is accepted by an individual, there is a contract which it is not within the power of the State to impair."

In the second and last opinion of the Supreme Court of Texas in the case at bar (Rec., pp. 21 to 24), the majority of the court denies the existence of any contract between plaintiff in error and the State, and holds so far as the grazing section involved in this case is concerned, that although plaintiff in error complied in every particular with the statutes in his application for the purchase of said land in the payment of the cash part of the purchase money to the State Treasurer, the obligation he executed to the State and the affidavit required by law, that yet his contract with the State was not complete until the acceptance thereof by the Commissioner of the General Land Office, and that that officer might in his discretion refuse acceptance of the contract tendered him by the plaintiff in error.

The court, in construing article 4218y, concludes that the word "may" in the last clause of that article was intended to be used by the Legislature in a permissive sense, and invested the Commissioner of the General Land Office with power to sell isolated and detached sections or fractional sections of the public school land at his discretion for any price not less than $1.00 per acre.

We submit that this conclusion is clearly erroneous, and assign the following reason to support our contention:

(a) Had such been the intention of the Legislature, the amendemnt of said article, by the Act of 1897, would have

been made by striking out the word "two" and substituting therefor the word "one." This would have fully and intelligently accomplished this purpose; but such was not the amendment. The amendment struck out of the law of 1895 (article 4218y, Revised Statutes, 1895), the words "at not less than two dollars," and inserted in lieu thereof the words "at one dollar;" thereby clearly evincing a purpose to change the minimum price to a fixed and unchangeable price, and denying any and all discretionary power to the Commissioner. This view is further strengthened by the fact that the amendatory act also deprived the Commissioner of the power he had theretofore possessed to sell isolated lands "upon such terms as he might prescribe," and directed that the lands should be sold "upon the same terms as other public school lands are sold, under the provision of the law," thus showing beyond controversy the purpose of the Legislature to deprive the Commissioner of all discretionary power.

(b) In view of the constitutional requirement commanding the sale of all public school lands, and the law carrying the same into effect, by which all school lands, not isolated and which require classification, shall be sold to actual settlers only in quantities not exceeding four sections to each settler; it is plain that the language of article 4218y in the Act of 1897 means, and was intended to mean by the Legislature, that all the isolated and detached sections or fractions of sections of school lands **must be sold,** and that in doing so the sale "may" be made to any person whomsoever who will pay the sum of $1.00 per acre therefor, although such person is not an actual settler. The word "may" in nowise relates to the Commissioner, but applies exclusively to the purchaser. The language does not say that the Commissioner "may sell," but it says that the isolated sections shall be sold, and "may" be sold to any purchaser for the fixed price of $1.00 per acre. All

the school land shall be sold, those which are classified and not isolated, to actual settlers alone at not less than a minimum price fixed by the law ;and those which are isolated and hence require no classification, "may" be sold to any purchaser though he be other than an actual settler.

(c) If the construction adopted by the court be correct, then the Commissioner my sell the isolated sections for a price not less than $1.00 per acre to such person as he may select as an object of his favor or bunty. For the courts holds that the Commissioner may sell, or may not sell, to any applicant as he in his discretion may determine; thus giving him an opportunity to reward his friends and punish his enemies—a power at once repugnant to justice and destructive of equality before the law.

(d) The construction adopted by the court is contrary to the wellrecognized canon of statutory construction adopted in Smission vs. The State, 71 Texas, 222, holding that "may" is always used in the sense of "shall," where the subject-matter is one in which the public have an interest to be protected or promoted by the exercise of a power or performance of a prescribed duty by a public officer, unless the context shows that the word was used in its primary signification.

(e) That the Legislature used the word "may" in the sense of "shall" appears conclusively from the emergency clause in the repealing Act of 1899, repealing the Act of 1897, in which the Legislature gives as a justification and cause for the repeal, the every reason that the sale of this land which the Act of 1897 required to be made, at the fixed price of $1.00, was to the detriment of the public school fund. Nor is it an answer to this statement of the Legislature that in the opinion of the court the Act of 1897 was improvident legislation; for the Legislature itself, being a co-ordinate branch of the government, is the exclusive judge

of the wisdom or improvidence of its legislation. So far as the record shows in this case, the legislation of 1897 fixing the price of isolated sections of school lands at $1.00 per acre, may not have been, and as is well known was not, at that time at all improvident. But the subsequent appreciation of the price of land under the general stimilus of prosperity throughout the entire country undoubtedly made it wise to pass the repealing Act of 1899. For this reason the court can not adopt as a safe canor of stautory construction the value of the land in the year 1900.

(f) That "may" was used in the sense of "shall" is further apparent from the fact that it is frequently so used throughout the entire statute of which 4218y is a part. Thus it was apparent that in the sixteenth section of the act under consideration by the court in Smisson vs The State, providing that pasture lands and agricultural lands "may" be leased, the word "may" did not invest the Commissioner with the power to lease or not as his discretion might dictate, but that "may be leased" meant "shall be leased." And, again, in article 4218f, Revised Statutes, as amended in 1897, it is provided that in cases where lands have been forfeited that the purchasers may have their claims reinstated upon certain conditions.

Certainly every one will admit that the word "may" is there used in the sense of "shall," and that the Commissioner would be without discretion to deny reinstatement to any purchaser who complied with the law.

Again, in section 5 of the Act of 1895, the word "may" occurs twice in the proviso attached to said section, and is plainly used in the sense of "shall," as otherwise the sense of the section would be nullified.

That the word "may" is used in the sense of "shall" in the particular statute in question is further apparent when the history of the legislation of which it forms a part is considered,

as is aptly stated by the Supreme Court of Texas in its first opinion in this case. The court says:

"It is to be observed that the provision in question only applied to lands lying in counties which had been organized before January 1st, 1875. Isolated sections and parts of sections of such lands had long been upon the market when the act which embraced this provision was passed, and had remained unsold. The presumption was that they were of little value and not marketable under the general provisions of the act. They were like the unsold remnants of a stock of merchandise—not sold because not saleable upon the terms and conditions upon which the bulk of the stock had been sold. This consideration doubtless impelled the Legislature to enact the special provision for the sale of detached lands. Therefore, in the original act, they removed all restrictions save as to a minimum price, and provided that such lands should be sold at such price not below $2.00 per acre, and upon such terms as the Commissioner of the Land Office might prescribe. It was ten years after the passage of the first act which conferred this power upon the Commissioner that the amendment was passed which was in force when the relator made application to purchase the lands in controversy in this case. The consideration which led to the first action of the Legislature bore with great force at the time the amendment was adopted. The Legislature doubtless then felt that the previous law had been inadequate for the disposition of these remnants of public free school lands, and that to affect a sale it was necessary not only to lower but to fix the price, and to take away all discretion in the premises from the Commissioner. The history of the legislation and the circumstances surrounding its subject-matter impel to the conclusion that the purpose of the Twenty-nfth Legislature, in passing the amendment of 1897, was to

make it the duty of the Commissioner of the General Land Office to accept all bids for isolated sections and parts of sections of the school lands at $1.00 an acre, upon the purchasers tendering the part of the purchase money and the obligation for the balance, as was required by the general law."

These isolated and detached sections which are to be sold to any purchaser, although not an actual settler, it thus appears are confined to counties organized prior to 1875, and were therefore necessarily the remnants of lands left over after purchasers had picked over and over again the public school lands in these counties. Each person, as he came along to settle in these old counties, acquired land either by virtue of a certificate, under the homestead donation or pre-emption acts, or under acts selling public free school lands, and picked out the best that was left; and when finally a section became isolated and detached, because all other State lands surrounding it had been sold, it must, in the nature of things, have been the poorest and least valuable in that vicinity.

It is unquestionably true, therefore, that at the time of the enactment of the law in 1897 it was believed, and found to be true, that these sections could not be sold, because they were remnants. An isolated section of timbered land, far away from the convenience necessary to bring the timber to a sawmill, can be of little value. In area it is too small to justify the building of a mill upon it or near it, as it would not afford sufficient employment for so expensive an investment. It must also be true that all these isolated sections of timbered lands are not within the reach of mills, otherwise they would have been purchased by mill owners. These conditions are equally applicable to grazing lands. For the cattle industry could not be prosecuted upon a single section of land to any advantage, and, hence, an isolated grazing section, cut off

from an opportunity to be united with other grazing lands, does not offer a reasonable investment for a stock-raiser, and its price must for that reason be depressed. But by the general appreciation of lands all over the State, resulting from high prices of all agricultural, ranch and dairy products, and the increase in the price of lumber, even these remnants of lands known as isolated and detached sections increased in price, and the Legislature, when it met in 1899, promptly repealed the Act of 1897, by which these lands could be sold at $1.00 per acre.

The Supreme Court of Texas, however, in its second opinion in this case, holds that plaintiff in error is not entitled to have an award or the timbered section, even if the interpretation of the statute contended for by us be true, for the reason that in the purchase of isolated and detached lands which are timbered the entire purchase sum must be paid in cash. It seems to us that under the statute in question this decision is untenable. Article 4218y, as amended by the Act of 1897, unequivocally provides that **all** sections or a fraction of sections in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio and Pecos Counties, which sections are isolated and detached from other public school lands, shall be sold to any purchaser at $1.00 per acre, upon the same terms that other lands are sold under the provisions of the law. The law is emphatic and unambigious in its declaration that all isolated and detached sections and fractions of sections shall be sold at the price of $1.00 per acre. Not that some of said lands, or a particular class thereof, such as agricultural and grazing lands, may be sold at the price of $1.00 per acre, but all lands, whether agricultural, grazing or timbered, must be sold upon the same terms. The statute could not be plainer

or more emphatic, and its language leaves no room for construction.

By the decision of the Supreme Court of Texas, however, the statute is made to read that only **grazing and agricultural** lands may be sold for $1.00 per acre. Thus, the court by its decision adds to the statute after the word "all" the words "grazing and timbered," which were not put into it by the Legislature. The argument of the court that timbered lands were not intended to be embraced in the provisions of article 4218y because of those sections of the Act of 1895, which provide that timbered lands shall not be sold for less than $5.00 per acre, and that the timber may be sold separate from the lands, appears to us as unsound, for if that be true, then it may be maintained with equal reason that agricultural and grazing lands are not embraced in the provisions of article 4218y, because under other provisions of the Act of 1895 they, too, have a minimum price, below which they are not to be sold. Therefore if the argument of the court be carried to its natural result, there would be no land of any kind that might be sold under the provisions of article 4218y, and that article would be meaningless and without purpose.

The Act of 1895, as had been done by the Act of 1887, provided a complete system for the sale of public school lands of the State. In doing so it divided the entire body of the land, which was to be sold to actual settlers, in three classes, viz: Agricultural, pasture and timbered land. It then fixes a minimum price upon each one of these classes. Agricultural lands are to be sold at not less than $2.00 per acre, pasture lands at not less than $1.00 per acre, and timbered lands at not less than $5.00 per acre. Article 4218h, Revised Statutes, of Texas, 1895, provides that the Commissioner of the General Land Office shall have the aforesaid lands classified and valued, after which he shall place them on the market for sale

at the valuation fixed thereon by him, which valuation must not be below the minimum price fixed by the law. It is evident that these provisions of the law apply exclusively to such lands as shall be sold to actual settlers only, and not to isolated and detached lands; because there can be no reason why the Commissioner should classify or value isolated and detached lands, inasmuch as they are to be sold under the Act of 1897 at $1.00 per acre. Classification or valuation could not increase or diminish their price. Classification of isolated and detached sections of land was never required under any of the acts of the Legislature by which these lands were offered for sale upon terms different from those upon which the general body of the school land was put upon the market. Classification of school lands, other than those which were isolated and detached, was necessary to determine to what class each section of land belonged, for the reason that the law fixed a minimum price for each separate class of these lands. The law provided that the Commissioner should classify school lands, other than isolated or detached sections, to determine whether they were agricultural, grazing or timbered lands, and the law fixed a minimum price for each one of these classes. Until so classified and appraised by the Commissioner, these lands were not placed upon the market or offered for sale, and classification and valuation was a pre-requisite to the sale, which sale could only be made to an actual settler. Not so, however, with isolated and detached lands. As to them no classifications were required, for they were to be sold to any purchaser, though not an actual settler, at not less than $2.00 per acre, under former acts, and at the fixed price of $1.00 per acre under the Act of 1897, irrespective of the class to which they belonged—that is to say, whether they were agricultural, grazing or timbered, the price fixed by the law was the same for all. Hence there was no necessity for classification, as in

the case of other lands not detached and isolated, upon which the law fixed a minimum price varying according to the class to which they belonged. That is to say, lands classed as agricultural were offered by the law at not less than $2.00 per acre, grazing lands at not less than $1.00 per acre, and timbeerd lands at not less than $5.00 per acre. (Rev. Stats., art. 4218h.) But detached and isolated sections the law directed to be sold, irrespective of their class, whether timbered, grazing or agricultural, prior to 1897, at not less than $2.00 per acre, and by the Act of 1897, under which plaintiff made his application, at the fixed price of $1.00 per acre. (See Act of 1895, sec. 26, General Laws of 1895, p. 74; General Laws of 1897, p. 187; Revised Civil Statutes of Texas, arts. 4218e, 4218f, 4218h, 4218y.)

Classification and valuation are required only where lands are to be sold for a price fixed by such classification, and where the valuation is determined by the particular classification which is placed upon the lands—that is to say, public school lands which are not detached or isolated are first required to be classified. By this process it is determined whether they are agricultural, grazing or timbered lands. That having been done, the next step to make these lands ready for the market is to appraise their value, and according to such appraisement they are offered for sale. It is obvious that these requirements of the statute do not apply to detached and isolated sections or fractions or sections, because the law fixes their price and there can be no purpose for any inquiry into their classification or value. This being true, it must follow that detached and isolated sections or fractions of sections are sold by the State in contemplation of law without knowing whether they are timbered, grazing or agricultural, and hence they are sold simply **as land** for the sum of $1.00 per acre. The law itself, from the moment it went into effect,

placed these lands upon the market at $1.00 per acre, and whenever a purchaser applies therefor to the Commissioner of the Geenral Land Office and complies with the terms of purchase, the sale is completed and the Commission is without discretion or power to withhold the land from the purchaser.

Again, in every case in which the particular section of the law regulating the sale of isolated and detached sections of school land has come under review before the courts of the State of Texas, the doctrine has been broadly and unequivocally laid down that it applies to all sections of school lands, whether they are agricultural, grazing or timbered lands, so long as they are isolated and detached, and situated in counties organized prior to January, 1875. In the Act of 1887, this section was numbered 22; in the Act of 1895, it was numbered 26, and in the Revised Statutes it is numbered article 4218y.

The first case in which this particular section was under discussion in Eastin vs. Ferguson (4 C. C. A., 643). The opinion was delivered by Associate Justice Williams. The particular section at issue in that case was classed at "dry grazing," and valued at $2.00 per acre. It is distinctly held by the learned Justice that the party claiming to have purchased this grazing section as isolated and detached, was entitled thereto as against a subsequent purchaser claiming as an actual settler, provided the land was, in fact, isolated and detached. In the particular case, the evidence showed that the land was not isolated and detached, and for no other reason the subsequent purchaser was held to have the best title thereo. In the course of the opinion the following language is employed in construing the statute:

"The purpose is plainly manifest to define by the provision of the law itself what character of lands may be sold and what classes of persons may purchase. These questions are not left

to the discretion of the Commissioner, but are settled by the statute. He may sell, as directed by the law, to actual settlers all the lands specified ;and may sell to no other class of persons any of them except those which are isolated and detached."

So it appears from this case that grazing lands, as well as agricultural land, when isolated and detached, are subject to purchase by any person for the price fixed by law. The next case in which the same section was under review is **Cameron vs. State (7 C. A., 37). In this case, that of Eastin** vs Ferguson was approved, and upon application to the Supreme Court of Texas a writ of error was refused. The lands in controversy were portions of the public school lands in Liberty County. It was contended by appellant that all public free school lands situated in counties organized prior to January, 1875, were isolated and detached from other public school lands, and subject to sale to others than actual settlers. To this contention the court declined to assent, and said:

"The power given to the Commissioner to sell to others than actual settlers is not only restricted to lands situated in counties organized prior to January, 1875, but to those sections or fractions of sections of land situated in such counties, which are detached from other public school lands * * * The Legislature may in its discretion lease or sell the school lands, and it may restrict the sale of certain classes. It is for the Legislature to determine when these lands shall be sold and on what terms and at what price they may be sold, and whether they may be purchased by capitalists for speculation, or only by actual occupants of the premises."

Thus again in this case did the court assert the doctrine that all lands which are isolated and detached, though they be in character other than agricultural, are subject to sale to any purchaser under the aforesaid section of the law. And the Supreme Court of Texas refused upon application to grant

a writ of error to set aside or modify the construction of the statute as declared in said cause. The Court of Civial Appeals at San Antonio, construing this particular section of the statute in the case of Shaver vs. Tinsley (16 C. C. A., 369), in which the controversy involved three hundred and twenty acres of public free school land in Harris County, **classified as grazing land,** distinctly affirmed the principle announced in Cameron vs. State. (7 C. C. A, 37.) In this case that of Eastin there was between a person not an actual settler, who had purchased the land from the State as isolated and detached, and a party who had also, but subsequently, purchased the land as an actual settler from the State. The Chief Justice, delivering the opinion, holds that though the section was grazing land, that nevertheless the sale thereof by the State through the Commissioner of the General Land Office as an isolated and detached section created the presumption that it was in fact isolated and detached, and that unless said presumption was overcome by sufficient evidence, the first purchaser had the better title to the land. And the court, finding the evidence was not sufficient to overcome this presumption, awarded the land to the person who had purchased it as an isolated and detached section . The doctrine of this last case is fully confirmed in the case of Thomas vs. Wolfe (16 C. C. A., 22), decided by the Court of Civil Appeals at Galveston, Associate Justice Williams delivering the opinion, where it is again held that any section of school land situated in a county organized prior to January, 1875, was subject to sale to any purchaser, though not an actual settler, and that the burden of showing that lands so sold are not isolated and detached, rests upon the person asserting it.

It thus appears that in contemplation of law there is no timber or grazing section beforee the court in this case. All distinctions of that character are obliterated and merged in

that class which the law designates as isolated and detached sections. As was held by the court in its first opinion, isolated sections of land are not required to be classified, and without classification there can be no legal ascertainment of the character of the land, whether it is agricultural, grazing or timbered. Isolated and detached sections of school lands under the Act of 1897 are sold simply as land without any legal or official knowledge on the part of the Commissioner as to whether they are grazing, timbered or agricultural, there being no method fixed by the law by which these facts can be ascertained. The general Statute divides the great body of school lands into three distinct classes, viz: agricultural, grazing and timbered lands? These classes are to be ascertained by classification and their price is to be fixed by appraiseemnt. The law then by section 4218y substracts and takes away from this great body of school lands the isolated and detached sections and fractions of sections and makes them a fourth and separate class, and provides for their sale at one dollar per acre, without providing for any distinction between them as it does among the other classes of school lands. There is no provision that the isolated and detached sections shall be classified to ascertain their character, because such classification would be useless, the law having fixed their price at one dollar per acre. There being no classification there is no method by which the character of isolated and detached sections can be determined, and they must be sold as provided by the law as lands for which the terms are tohse which the relator offered in his application and obligation to the State.

If our reasoning on this subject be correct it must result in the conclusion that all isolated and detached lands must be sold at one dollar per acre, 1-40 of which is payable in cash and the balance in 39 equal installments with interest at the rate of three per cent per annum.

The record in this case does not disclose with certainty at what time the lands applied for by plaintiff in error became isolated or detached. This fact, however, is not material in the determination of the question involved here, for it is the accepted rule in the State of Texas that the law in relation to the sale of detached and isolated sections of school lands is applicable to such sections although they may have become isolated and detached even after the enactment of the law on that subject.

Plaintiff in error respectfully prays that the judgment of the Supreme Court of Texas may be reversed with instructions to that Court to issue the writ of mandamus directing the Commissioner of the General Land Office of the State of Texas to award him the land described in his petition.

F. C. Hume

Attorney for Plaintiff in Error, Paul O. Weber.

H. E. Kleberg

of Counsel.

Chapter 47.—An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools and the several asylums, and the lease of such lands and of the public lands of the State, and the patenting of any part of said lands for church, cemetery or school house sites; and to prevent the free use, occupancy, unlawful enclosure or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor.

Section 1. Be it enacted by the Legislature of the State of Texas: That all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the Lunatic Asylum, the Blind Asylum, the Deaf and Dumb Asylum, and the Orphan Asylum shall be sold and leased under the provisions of this act.

Sec. 2. The Commissioner of the General Land Office is hereby vested with all the power and authority necessary to carry into effect the provisions of this act, and shall have full charge and discretion of all matters pertaining to the sale and lease of said lands, and their protection from free use and occupancy and from unlawful enclosure, with such exceptions and under such restrictions as may be imposed by the provisions of this act, or by the Constitution of the State. He shall, as soon as practicable, adopt such regulations not inconsistent with the Constitution or this act as may be deemed necessary for carrying into effect the provisions of this act, and may from time to time alter or amend such regulations so as to protect the public interest; but all regulations shall be submitted to the Governor for his approval before adoption or promulgation. He shall adopt all necessary forms of applications for sales or leases and all other forms necessary or

proper for the transaction of the business imposed upon him by this act, and may from time to time call upon the Attorney General to prepare such forms; and it shall be the duty of that officer to furnish the Commissioner of the General Land Office with such advice and legal assistance as may be requisite for the due execution of the provisions of this act; and it shall be the duty of such Commissioner to call upon the Attorney General for advice whenever there is any doubt as to the meaning of this act or any provisions thereof.

Sec. 3. The Commissioner of the General Land Office shall from time to time, as the public interest may require, cause any or all of the lands belonging to the several funds mentioned in this act to be carefully and skillfully classified and valued that have not heretofore been classified, and for this purpose he may appoint, with the approval of the Governor, such number of competent agents, who shall be citizens of the county or district where such land is situated, as may be necessary, or may determine and declare the classification and valuation without the aid of such agents, and upon such facts as may be satisfactory to the Commissioner. Such agents shall receive for their work a reasonable compensation, to be fixed by the Commissioner of the General Land Office, and not to exceed the sum of three dollars per section; and no such expense shall be incurred in the absence of an appropriation by law to cover such expenditure, and the State shall not be liable for any expenditure of this character incurred in excess of current appropriations.

Sec. 4. It shall be the duty of such agents as may be appointed under the provisions of this act, under such restrictions and instructions as may be prescribed by the Commissioner of the General Land Office, to classify such lands belonging to the several funds mentioned in this act as the Commissioner may direct, into agricultural, pasture, and timber

lands, and for this purpose they shall carefully examine the same and after such examination they shall prepare an accurate plat of each section, showing the relative proportions of timber and open land on such section, and their situation; also, the quality of the soil, the topography of the land, and the quality and kind of timber, and the streams and other sources of water supply, and their location, and such other facts as may be important; and from time to time, as may be prescribed by the Commissioner of the General Land Office, such agent shall prepare and forward to the Commissioner, with such plats, a tabulated statement of such lands so examined by him, with the value of each section, and such plats and reports when approved by the Commissioner shall be filed in the General Land Office as a part of the records of said office; but nothing in this act shall be construed to require or authorize a classfication of lands already classified under former laws. Provided, that any section or part of any section heretofore classified as timbered land which is not pine land nor valuable chiefly for the timber thereon may be classified under the provisions of this act as agricultural lands.

Sec. 5. When any portion of said land has been classified to the satisfaction of the Commissioner under the provisions of this act or former laws, such lands shall be subject to sale, but to actual settlers only, and in quantities of not less than forty acres, and in multiples thereof, nor more than one section containing six hundred and forty acres more or less: Provided, that when there is a fraction less than forty acres of any section left such fraction may be sold; but lands classified as purely pasture lands may be sold in quantities not to exceed four sections to the same settler.

Sec. 6. It shall be the duty of the Commissioner of the General Land Office to notify in writing the county clerk of each county of the valuation fixed upon each section of land in

his county, and in each county attached to it for judicial purposes, which he offers for sale, which notification shall be kept by the clerk in his office and recorded in a well bound book, which shall be open to public inspection.

Sec. 7. All lands belonging to the public free schools and the several asylum funds shall be sold at no less than two dollars per acre, except pasture lands, which shall be sold at not less than one dollar per acre, and all timber lands shall be sold at not less than five dollars per acre. By timber lands as here used is meant lands valuable chiefly for the timber thereon.

Sec. 8. Any bona fide actual settler who may reside on any part of the lands the sale of which is authorized by this act at the time this act may go into effect, shall have the prior right for a period of ninety days after this act goes into effect, or after said land shall have been placed upon the market, to purchase such quantity of land as may be limited by this act, to include his improvements, upon complying with the provisions of this act regulating sales as in other cases, and such land shall be appraised without reference to the improvements thereon. Any bona fide settler who has heretofore purchased or who may hereafter purchase not exceeding one section of agricultural land, shall have the right to purchase three strictly pastoral sections upon his making oath that he is not acting in collusion with others for the purpose of buying for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same.

Sec. 9. All sales shall be made by the Commissioner of the General Land Office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their

purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the Commissioner of the General Land Office within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the Commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact. If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former laws, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein. Any person desiring to purchase land in accordance with the provisions of this act shall forward his application to the Commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. Any owner of land heretofore purchased, and which land has been or may be forfeited for nonpayment of interest, shall have ninety days prior right after this act goes into effect, or after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he

shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years: Provided, that when any forfeiture has been made the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein. Any original purchaser or his vendee of any of the lands the sale of which is provided for in this act, who has improved such land as a home, and who has been forced to temporarily abandon same on account of drouth, and who shall in good faith reoccupy the same, either by themselves or vendees, within six months after this act goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy: Provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have reoccupied the land as a home in good faith, and that they had abandoned the same on account of the drouth and not otherwise; and such absence shall not be deducted from the three years occupancy required by law in making final proof of occupancy: And provided further, that any purchasers or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases shall have six months after this act shall take effect to make such proof of occupancy as required by the provisions of this act. The purchaser shall transmit to the Treasurer of the State one-fortieth of the aggregate purchase money for the particular tract of land, and send to the Commissioner his obligation to the State, duly executed, binding the purchaser to pay to the State on the first day of November of each year thereafter, until the whole purchase money is paid, one-fortieth

of the aggregate price, with interest at the rate of three per cent per annum on the whole unpaid purchase money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase money by the Treasurer, and the affidavit and obligation aforesaid by the Commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the General Land Office: Provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase money at the time of his purchase.

Sec. 10. Purchasers shall have the option of paying the purchase money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land for three consecutive years, they shall receive patents for the same upon payment of the patent fees prescribed by law. Purchasers may also sell their lands or a part of the same, in quantities of forty acres or multiples thereof, at any time after the sale is effected under this act, and in such cases the vendee, or any subsequent vendee, or his heirs or legatees, shall file his own obligation with the Commissioner of the General Land Office, together with the duly authenticated conveyance or transfer from the original purchaser and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies or to which said county may be attached for judicial purposes, together with his affidavit, in case three years residence has not already been had upon said land and proof made of the fact, stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he has not acted in collusion with others for the purpose of buying the land for any other person or corporation, and

that no other person or corporation is interested in the purchase, save himself, and thereupon the original obligation shall be surrendered or canceled or properly credited, as the case may be, and the vendee shall become the purchaser direct from the State, and be subject to all the obligations and penalties prescribed by this act, and the original purchaser shall be absolved in whole or in part, as the case may be, from further liability thereon: Provided, that whenever a town shall be located and established upon any lands sold under this or any former act, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the State upon such land and obtain a patent therefor at any time, but no such payment shall be permitted or patent issued until such purchaser or owner of such land shall file in the General Land Office a certified plat of such town, made by a surveyor, which shall be accompanied by the affidavit of the owner of such land, corroborated by the affidavit of five disinterested and credible citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and is being occupied by bona fide citizens, twenty business and residence houses, or either, or both.

Sec. 11. If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation "Land Forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law: Provided, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make

payment after the first day November next after such death, and shall be absolved and exempt from the requirement of settlement and residence thereon. And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the State, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred: Provided, that all necessary and temporary absence from such land of such purchaser, for the time of not more than six months in any one year, for the purpose of earning money with which to pay for the land, or for the purpose of schooling his children, shall not work a forfeiture of his title: Provided further, that nothing in this section contained shall be construed to inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land, which suit may be instituted by the Attorney General or under his direction, in the proper court of the county in which the land lies or of the county to which such county is attached for judicial purposes: Provided, this section shall be printed on the back of the receipt.

Sec. 12. In all cases where persons have purchased or may hereafter purchase State, school, or asylum lands under any act of the Legislature authorizing the sale thereof and requiring a residence of three years thereon, and said persons have so resided upon said land or may hereafter reside thereon for the period of three years as required by law, and their files have been or may hereafter be canceled and purchases annulled by the Commissioner of the General Land Office on account of conflict with other surveys, said persons shall have the right to purchase other lands of the classes mentioned in

this act without being required to reside thereon. Persons desiring to avail themselves of the benefits of this provision shall make satisfactory proof to the Commissioner of the three years residence under their first purchase.

Sec. 13. In all cases where any of the lands mentioned in this act have been heretofore sold under any law authorizing the sale thereof, and the original purchaser shall have sold or may hereafter sell any part of his purchase in quantities of forty acres or multiples thereof, and the conveyance to his vendee or vendees is filed in the General Land Office after having been duly recorded in the proper county, the Commissioner and Treasurer shall credit his account with the value of the land sold, and they shall open up new accounts with the original purchaser and such vendee or vendees, and the Commissioner of the General Land Office shall patent said land to the owners thereof in quantities of forty acres or multiples thereof: Provided, that when any of such land it situated within three miles of a county seat, it may be patented in twenty acre tracts.

Sec. 14. The Commissioner of the General Land Office is hereby authorized to patent in quantities of not less than one nor more than five acres any of the vacant and unappropriated public domain of Texas or any of the lands mentioned in this act as sites for cemeteries, churches or school houses. When the land is desired as a location for a school house, the patent shall issue to the county judge of the proper county and his successors in office in trust for that purpose; and when desired for a church house or a cemetery, it shall be issued to trustees designated by those requesting the patent. If the land has been previously sold by the State and not patented, the owner thereof shall execute a deed therefor to the county judge or trustees as the case may be, and cause the same to be recorded in the office of the county clerk of the proper county, and be

filed in the General Land Office, and shall be entitled to credit on his account with the State for the value therefor. Except in case of vacant land the value of the land shall be deposited with the State Treasurer, and in all cases the patent fees shall be paid to the Commissioner of the General Land Office before patent issues. Such land shall be taken from the margin of a tract or section or of a subdivision thereof, as the case may be.

Sec. 15. The Commissioner of the General Land Office shall retain in his custody as records of his office all applications, affidavits, obligations and all other papers relating to the sales of said lands, and shall cause to be kept accurate accounts with each purchaser. All purchase money due upon lands, as well as accrued interest, and all other moneys arising from the sales or leases of said lands shall be paid by the purchaser or lessee direct to the Treasurer of the State, who shall cause an accurate account to be kept with each purchaser, and who shall execute duplicate receipts for all sums of money paid to him under the provisions of this act, one of which receipts shall be delivered to purchaser or his agent, and the other transmitted to the Commissioner of the General Land Office.

Sec. 16. The Commissioner of the General Land Office shall adopt such regulations for the sale of the timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the Commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value: Provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to re-

move the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the State without judicial ascertainment: Provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to the classifications to be made by the Land Commissioner: Provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this act.

Sec. 17. The public lands and all lands referred to in the several funds mentioned in this act shall be leased by the Commissioners of the General Land Office under the provisions of this act. All lands classified as agricultural and all lands containing permanent water thereon shall be leased for a term of five years or less at not less than three cents per acre per annum, and all lands classified as pasture or dry grazing lands shall be leased for a term of not more than ten years at not less than two cents per acre per annum, which rental shall be paid yearly in advance, the first payment to be made at the time the lease contract is entered into. If at the termination of any lease the lands covered thereby are still for lease the lessee thereof shall have the preference right to again lease such lands theretofore leased by him upon the terms and at the prices then fixed by law. All leases shall be executed under the hand and seal of the Land Commissioner and delivered to the lessee or his duly authorized agent, and such lease shall not take effect until the first annual rental is paid, and such lease thereof duly filed for record in the clerk's office of the proper county, and it shall not be necessary for the Commissioner to acknowledge such lease contract so signed and delivered; and all leases under the provisions of this act shall be

advertised by the Commissioner in such manner as he may think best, and let to the highest responsible bidder in such quantities and under such regulations as he may think to the best interest of the State, not inconsistent with the equities of the occupant. All bids and offers to lease may be rejected by him prior to signing the lease contract, for fraud or collusion, or other good and sufficient cause.

Sec. 18. Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this act shall make application in writing to the Commissioner of the General Land Office, specifying and describing the particular lands he desires to lease, and thereupon the Commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, shall notify the applicant in writing that his proposition to lease is accepted, and thereupon he shall execute and deliver to the lessee, in the name and by the authority of the State of Texas, a lease of said land for such term as may be agreed upon, and deliver the same to such lessee when satisfied that the lessee has paid to the Treasurer of the State the rent for one year in advance. No lands which are now or may hereafter be classified as grazing or pasture lands shall be subject to sale, nor shall the possession thereof by the lessee be disturbed during the term of such lease, except as herein provided, so long as the rents are paid promptly in advance each year, as required by this act. Any actual settler upon any of the lands mentioned in this act, being the head of a family, shall have the right to buy at any time not more than three additional sections of strictly pasture lands, notwithstanding any lease thereof, unless by some other actual settler, the head of a family, leasing not more than three sections. Whenever any leaseholder has leased from the State of Texas exceeding ten sections, any actual settler being the head of a family, shall have the right to lease within

a radius of five miles of the land occupied by him not exceeding three sections of the land held by such larger leaseholder, but shall not be allowed thereby to reduce the larger leasehold to less than ten sections: Provided, that any man not the head of a family shall have this preference right to lease three sections after having placed two hundred dollars worth of improvements on the section purchased by him: Provided, that in all cases where the actual settler having purchased one section of land is permitted by the provisions of this section to buy or lease additional lands, and thus terminate the lease of the larger leaseholder, he shall be required to so select such additional lands sought to be purchased or leased by him as that by an exchange of lands, section for section and acre for acre, of like quality and class with the larger leaseholder, he can secure the quantity of land he desires to purchase or lease in a solid body; and in case the larger leaseholder desires to do so, the actual settler so purchasing or leasing the additional lands in this section mentioned shall make such exchange with him, and shall be required to fence the same separate and apart from the lands of the larger leaseholder; but in no case shall the actual settler be allowed to purchase or lease the lands and terminate the lease of the larger leaseholder under the provisions of this section upon which there is a permanent natural or artificial water supply; and in no case shall such actual settler be permitted to so select such additional lands for purchase or lease as that by an exchange of lands with the larger leaseholder such larger leaseholder will be required to give in exchange any lands upon which there may be a permanent natural or artificial water supply, or upon which there may be improvements of the value of two hundred dollars. In case the larger leaseholder does not desire to exchange lands, as herein provided, with the actual settler, or upon request made by such actual settler refuses to do so within a reason-

able time, then he shall not be required to fence his land, but may turn loose inside of any inclosure in which his lands may be situated not more than one head of cattle or horses, or in lieu thereof four head of sheep or goats, for every ten acres of land so purchased or leased by him: Provided further, that nothing herein shall be construed so as to prevent either the lessee from fencing his own land from the other if he should desire to do so, or to require the small leaseholder to fence his lands at all unless the larger leaseholder shall have his leasehold fenced: And provided further, that nothing in this section shall be so construed as to permit any actual settler, either by purchase or lease, or by both, to terminate the lease of the larger leaseholder upon more than four sections: And provided further, that north of a line extending west from the southeast cornerof Callahan county to the southeast corner of Martin county; thence north to the south line of Lynn county; thence west to the southwest corner of Lynn county; thence north to the south line of Castro county; thence west to the line of New Mexico, the settler exercising the preference right herein given to buy or lease within the enclosure of another may so buy or lease any lands except a section on which there are improvements of the value of two hundred dollars, or on which there is a permanent artificial water supply, and shall not be required to enclose his lands separate from the lands of the larger leaseholder unless he can obtain the full amount of four sections in a solid body, or unless the same can be secured in a solid body by the exchange of lands for the term for which he leases, section for section or acre for acre, with the larger leaseholder; and in all cases where he is not required by the provisions of this act to enclose his lands he may turn loose not more than one head of horses or cattle, or in lieu thereof four head of sheep or goats, for every ten acres of land purchased or leased by him and unenclosed. Each violation of

the provisions of this act which restricts the number of stock that may be turned loose on lands leased from the State shall be an offense, and the offender, on conviction, shall be punished by fine of one dollar for each head of stock he may so turn loose, and each thirty days violation of the provisions of this section shall constitute a separate offense. Any agricultural land that may be leased by an actual settler shall be subject to sale and settlement, but in case his lease does not embrace more than three sections, only on condition that the purchaser enclose with posts and at least two wires the land purchased by him separate from the land held by the lessee, and failure to so enclose it within three months from the date of the purchase shall be sufficient cause to authorize the Commissioner to cancel the contract of purchase and reinstate the lease. In all cases where the lease is terminated under any of the previsions hereof, before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent, or the money refunded to him by the Treasurer, as he may elect. On the expiration of his lease or its termination under any provision of this section the lessee shall have the right for a period of sixty days to remove any or all the improvements he shall have placed upon the leased premises.

Sec. 19. Any person desiring to lease any portion of the lands aforesaid on which no permanent water supply exists, shall notify the Commissioner of the General Land Office in writing that he desires to lease lands, specifying and describing them, provided he can obtain the necessary supply of water by boring or otherwise, and that he will within ninety days lease said lands, provided such water supply can be obtained; he shall also make and file with the Commissioner of the General Land Office his bond, with good and sufficient personal security in a sum equal to one year's rental of the quantity of land applied for, payable to the State of Texas,

conditioned that he will diligently and in good faith try to secure water on such land during such ninety days, and if secured will lease the designated lands for the term prescribed herein, and thereupon the Commissioner shall for such ninety days withhold the lands thus designated from lease to any other person; within or at the expiration of said ninety days and annually thereafter such applicant to lease shall pay to the State of Texas, in advance, one year's retal of the land applied for by him, on satisfactory proof of which payment the Commissioner shall execute and deliver to the lessee a lease of the said lands, signed by him officially and attested by the seal of the Land Office, together with which he shall deliver up the bond of said lessee, marked "Satisfied." If the said lessess shall fail to apply for his lease and make the payment aforesaid within said ninety days, and shall also within said ninety days fail to make proof to the satisfaction of the Commissioner of the General Land Office within that time that he has in good faith and diligently used proper means and expended proper efforts to secure a water supply on such land and failed, then and in that case the Commissioner shall mark said bond "Forfeited," and shall deliver the same to the Attorney General of the State, who shall at once cause the said bond to be sued upon and collected; and such collection shall become a part of the available school fund. The penalty stated in such bond is hereby declared to be liquidated damages, and judgment for that sum shall in all cases be recovered by the State. Proof satisfactory to the Commissioner of the General Land Office that proper, suitable and diligent effort had been made by such applicant to secure water, and that sufficient water could not be secured, shall relieve the principal and sureties on said bond from all responsibility therein, and it shall be marked "Satisfied" by said Commissioner and delivered to the principal therein. No lease of less than four sec-

tions of unwatered pasture lands shall be made unless such less number includes all unlased land in that vicinity belonging to the several funds mentioned in this act. Lessees or their vendees who shall have at their own expense secured water on their leaseholds in accordance with the provisions of this section shall, at the expiration of their lease contract, have the right to a renewal of their leases for another term of five years at the price then provided by law, by giving sixty days written notice to the Commissioner, as provided in the preceding section.

Sec. 20. All lessess from the State of lands named in this act, who are one year or more in arrears on their contract for rent, shall have the right for a period of four months from the time this act shall go into effect, but not longer, within which they may execute and deliver to the Commissioner of the General Land Office their respective obligations in writing, with personal security satisfactory to the Commissioner, for the respective sums of money then owing by them to the State; and on delivery of such obligation to the Commissioner and the cash payment of one year's rental in advance, they shall have the right to have their lease contracts canceled, and may lease such lands anew under this act. Such obligation shall bind such lessees to pay said sums of money, one-third in one year, one-third in two years, and the remainder in three years from date, and shall draw six per cent interest per annum, payable annually; and thereupon the Commissioner shall balance their accounts on the books of his office and cancel and deliver up their old leases and make to them new leases under this act. All lessees who are not in arrears for rent, or who shall pay all indebtedness on leases, have the right to surrender their present leases and lease anew their said lands under this act.

Sec. 21. All lessees shall pay the annual rents due for leased lands directly to the Treasurer of the State, who shall execute receipts in duplicate for each payment made by any lessee, one of which receipts shall be delivered to the lessee and other transmitted to the Commissioner of the General Land Office. The Treasurer shall cause to be kept an accurate account with each lessee, and the Commissioner of the General Land Office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute a part of the records of his office.

Sec. 22. If any lessee shall fail to pay the annual rent due in advance for any year within sixty days after such rents shall become due, the Commissioner of the General Land Office may declare such lease canceled by a writing under his hand and seal of office, which writing shall be filed with the other papers relating to such lease, and thereupon such lease shall immediately terminate, and the lands so leased shall become subject to purchase or lease under the provisions of this act. Such lease shall not be made to original lessees until all arrears are fully paid. During the continuance of all leases, and after forfeiture, the State shall have a lien upon all property owned by the lessee upon the leased premises to secure the payment of all rents due, which lien shall be superior to all other liens whatsoever; and it shall not be essential to the preservation or validity of such lien that it shall be reserved in the instrument of lease.

Sec. 23. Lessees have the right at any time to purchase their leased lands, subject to the limitations as to quantity provided by this act, and at the price and on the conditions herein provided, without reference to any improvements made on such lands by such lessees; and all improvements made by lessees on lands leased by them are hereby declared to be per-

sonal property, which may be removed by such lessees on the expiration of their lease contracts; and they shall have sixty days after such expiration in which to remove the same.

Sec. 24. If the Governor shall at any time be informed upon the affidavit of some credible person that any portion of the public lands or the lands belonging to any of the several funds named in this act have been enclosed, or that fences have been erected thereon without authority of law, he is authorized in his discretion to direct the Attorney General to institute suit in the name of the State for the recovery of such lands and damages, and a fee of not less than ten dollars for the attorney when the sum recovered is less than one hundred dollars, and when it is over that sum the fee shall be ten per cent, to be paid by the defendant for the use and occupancy of the same, and the removal of such enclosures and fences and such damages shall not be for a less sum than the amount of all the leases due during such occupancy. Such suit may be instituted in the district court of the judicial district in which the land or any portion thereof (is) situated; and upon application of the Attorney General and without affidavit or bond the court in which suit is pending shall issue a writ of sequestration directed to any sheriff of the State, commanding and requiring such officer to take such land and all property thereon belonging to the person or persons so unlawfully occupying said land into his actual custody, and hold the same subject to the further orders of the court. Such writ of sequestration may be executed by any sheriff of the State into whose hands it may be delivered, and it shall be the duty of any sheriff into whose hands it may come to proceed and execute such writ. The defendant in such suit may replevy as in ordinary cases by giving bond as prescribed by law, and such cases shall have precedence on the docket and stand for trial before all other cases; and in case judgment is recovered by

the State in such suit, the court shall order such enclosures or fences to be removed and shall tax the costs of the suit, if any, against the defendant; and all property found upon the land belonging the defendant, not exempt from execution, shall be liable to the payment of such costs and damages in addition to the personal liability of the defendant. Appeals may be prosecuted from all judgments in such cases as in ordinary cases, except that the State shall not be required to give bond to perfect its appeal, and such cases on appeal shall have precedence over all other cases. If any person shall make a lease contract, and after the same is enclosed by fence shall for any cause decide not to continue payment of his lease, either in whole or in part, he shall give public notice by publication in any local paper having the largest circulation, for at least sixty days before the time in which his next annual payment shall become due, that he will not continue his lease after the year for which payment is made, and shall also state the number and block of the land which he will not lease inside his enclosure, if he only intends to surrender a part of his lease, and shall post and keep posted for said sixty days notices on all the gates of his pasture of such intention; then, and then only, he shall not be subject to the suit nor be liable for the damages provided for in this section.

Sec. 25. It shall be unlawful for any person to fence, use, occupy or appropriate by herding or line riding, any portion of the public lands of the State or of the lands belonging to any particular fund specified in this act, without having first obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, agent, employee or servant, who shall fence, use, occupy or appropriate by herding or line riding any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon convic-

tion, be fined not less than one hundred nor more than one thousand dollars, and in addition thereto shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, occupying using or appropriating by herding or line riding shall be deemed a separate effense, and any person so offending may be prosecuted by indictment or information in the proper court of the county where any portion of the land lies, or to which it may be attach for judicial purposes, or in the county of Travis, and jurisdiction of such offenses is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this article, it shall be the duty of the Governor to demand the extradition of the defendant from the proper officer of any State or Territory where he may be found, in order that he may be brought to trial. "Fencing," within the meaning of this article, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs, whether the same shall enclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act or of the public lands of this State, without having first obtained a lease thereof, by fencing of any kind, or by enclosures consisting partly of fencing and partly of natural obstacles or impediments to the passage of live stock, shall be deemed an unlawful appropriation punishable as provided in this article for appropriating such lands, and each day said land is appropriated shall be deemed a separate offense.

Sec. 26. The Commissioner of the General Land Office may withhold from lease any agricultural lands necessary for purposes of settlement; and no agricultural lands shall be leased if in the judgment of the Commissioner they may be in

1416

immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only under the provisions of this act; and all sections or fractions of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than two dollars per acre, upon such terms as the Commissioner of the General Land Office may prescribe.

Sec. 27. All laws and parts of laws in conflict with this act are hereby repealed.